

Collas Crill explains... Reserved powers

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Why have reserved powers?

Settlors can sometimes be uncomfortable to part with their hard earned cash or give up the day-to-day management of a company that is to be held in a trust. Therefore some settlors wish to retain a level of control over assets that they transfer to a trustee to be held on trust.

These controls are what we refer to as 'reserved powers' and settlors can deploy them to assist in achieving their wealth planning objectives and to assist in allaying any fears that they may have once their assets have been transferred to their trustee to be held on trust.

Where is Guernsey's reserved powers legislation?

Guernsey's reserved powers legislation is contained in section 15 of The Trusts (Guernsey) Law, 2007 (**Trust Law**). This legislation provides an increased legal certainty for 'reserved powers trusts' or 'settlor-directed trusts' (as they are sometimes known) ensuring that, despite the settlor (or other person) retaining control over the assets, the trust is not necessarily invalidated.

Who can be a reserved power holder?

The Trust Law allows for the reservation of powers to non-trustees. This allows powers to be reserved by:

- a "settlor"; or
- "*any other person*" (eg a protector or beneficiary).

What powers can be reserved?

Section 15(1) of the Trust Law provides that the reservation or grant by the settlor (whether to the settlor or to any other person) of any or all of the following powers or interests does not invalidate a trust:

- a power to revoke, vary or amend the terms of the trust or any trusts or functions arising thereunder, in whole or in part;
- a power to advance, appoint, pay or apply the income or capital of the trust property or to give directions for the making of any such advancement, appointment, payment or application;
- a power to act as, or give directions as to the appointment or removal of, a director or other officer of any corporation wholly or partly owned as trust property;
- a power to give directions to the trustee in connection with the purchase, retention, sale, management, lending or charging of the trust property or the exercise of any function arising in respect of such property;
- a power to appoint or remove any trustee, enforcer, trust official or beneficiary;
- a power to appoint or remove any investment manager or investment adviser or any other professional person acting in relation to the affairs of the trust or holding any trust property;
- a power to change the proper law of the trust or the forum for the administration of the Trust;
- a power to restrict the exercise of any function of a trustee by requiring that it may only be exercised with the consent of the settlor or any other person identified in the terms of the trust; and
- a beneficial interest in the trust property.

What are the responsibilities of a reserved power holder?

The Trust Law (at section 15(2)) clarifies the position that the holder of any reserved power under section 15(1) does not make the holder of the power or interest a trustee or (subject to the terms of the trust) impose any fiduciary duty on the holder.

Is a trustee liable for the actions of a reserved power holder?

The Trust Law (at section 15(2)) confirms that the reservation, grant or exercise of a reserved power does not of itself render any trustee liable in respect of any loss to trust property. Section 15(3) further clarifies that a trustee who acts in compliance with any valid exercise of a reserved power is not acting in breach of trust by reason only of compliance with such power.

Can too many powers be reserved?

In practice, many advisers suggest that if a settlor reserves too many powers, there is a risk that the trust will fail (or, at least, be more open to challenge) because the trust will not have the 'irreducible core' of obligations that are required in order for the trust to be valid.

However, section 15(1) of the Trust Law makes it clear that a settlor (or other person) can reserve '*all or any*' of the powers listed in the statute. Therefore, notwithstanding the hesitance to reserve too many powers, the black letter of the law does state that reserving 'all' the statutory powers does not invalidate a Guernsey trust.

Despite the use of the word 'all' it is still advisable, in order to mitigate the risk of the validity of the trust being questioned, that a settlor only chooses those powers that they need in order to feel comfortable with their control levels over any trust. There are jurisdictions that do not recognise reserved powers in the same way as Guernsey, for example, where the validity of a trust with extensive reserved powers may more likely be challenged.

Other considerations to be made

For various tax related reasons it may not be suitable for a settlor (or other person) resident in certain jurisdictions to have any reserved powers. Furthermore, from a FATCA and CRS perspective, consideration should be given to who might be a 'reportable person' should there be reserved powers under a trust.

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